

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
(Suisin, Vacaville, and Vallejo, California)

PRIVATE INDUSTRY COUNCIL OF SOLANO COUNTY, INC.  
Employer

and

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 1280, AFL-CIO, 1/  
Petitioner

**20-RC-17574****DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 4/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 6/

All full-time and regular part-time administrative/program specialists I, administrative/program specialists II, administrative/program technicians I, administrative/program technicians II, and administrative/program technicians III employed by the Employer at its Suisin, Vacaville and Vallejo, California, locations; and excluding all other employees, managers, confidential employees, guards and supervisors as defined in the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1280, AFL-CIO.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 29, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by March 7, 2000.

Dated February 22, 2000

at San Francisco, California

/s/ Robert H. Miller  
Regional Director, Region 20

- 1/ The Petitioner's name is in accord with the stipulation of the parties.
- 2/ At the hearing, the parties agreed to leave the record open pending the receipt into evidence of Board Exhibit 2, a stipulation by the parties, and Employer's Exhibits 6 and 7, personnel action forms related to two employees at issue herein, Marcia Scarberry and Ben Sapp. These exhibits have been received and placed into evidence and the record is hereupon closed.
- 3/ The parties stipulated, and I find, that the Employer is a California non-profit corporation with its principal place of business located in Suisin, California, engaged in providing employment training and placement services pursuant to contracts with the State of California which utilize funds provided by the U. S. Department of Labor. During the fiscal year ending June 30, 1999, in the course of providing the above-described social services, the Employer received annual revenue in excess of \$250,000; during the same period, the Employer purchased goods valued in excess of \$5,000 which originated from points outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.
- 4/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 5/ The parties stipulated that there is no contract bar to this proceeding.
- 6/ The Petitioner seeks to represent a unit comprised of all full-time and regular part-time employees of the Employer in the positions of administrative/program specialists I and II, administrative/program technicians I, II and III; and excluding all other employees, managers, confidential employees, guards and supervisors as defined in the Act.

The Employer contends that the unit must exclude three limited-term employees (i.e., Nel Sweet, Marcia Scarberry and Ben Sapp) as temporary employees and the Petitioner takes the position that these employees are not temporary employees and should be included in the unit.

Stipulations: The parties stipulated, and I find, that the summer youth participants, summer youth counselors, and persons working in a welfare to work program should be excluded from the unit as temporary employees.

The parties stipulated, and I find, that the following individuals should be excluded from the unit as confidential employees: Executive Assistant III Loraine Lyman,

secretary to the Employer's Board of Directors; and Personnel Benefits Specialist III Diane Duane.

Lastly, the parties stipulated, and I find, that the individuals in the following classifications should be excluded from the unit as supervisors under the Act: President/Executive Director Robert Bloom; Planning/Grants Manager II Lynette Gray; Fiscal/MIS Manager Kitt Lee; Fiscal Coordinator Mia Kelly; MIS Coordinator Tracy White; North County Career Center Manager Ray McDonald; Administrative Services Manager Cheryl Joseph; Assistant Center Manager I Jacque Patterson; Adult Program Coordinator Anne Penny; Special Projects Coordinator John Tompkins; Intake Coordinator Mildred James; Welfare-to-Work Coordinator Robbie Wilson; South County Career Center Manager II Bev Lane; Facilities Specialist II Joe Carter; CRC Coordinator (vacant); Assistant Center Manager I Marion Aiken; IHF Coordinator Janet Francisco; and Employer Services Coordinator Derry Moten.

Background. The Employer is a non-profit private corporation with a principal place of business in Suisin, California, and other locations in Suisin, Vacaville and Vallejo, California. The Employer provides job training and placement services for Solano County (herein called the County), and receives operating funds through federal grants administered through the County. The County is a grant recipient for federal funds under the Job Training Partnership Act (JTPA) and the Welfare-to-Work Act. The Employer administers these programs for eligible area residents who are economically disadvantaged and/or dislocated from employment due to plant or military base closures, long-term layoffs, and/or outdated job skills. It operates a wide-range of out-reach/recruitment programs; marketing programs; handles intake eligibility determination, testing, counseling, guidance referral, tracking, supportive services, job search and job development, and related services for eligible County residents.

Limited-Term Employees. The Employer occasionally hires limited-term or temporary employees for either a specific project or assignment. The Employer's Personnel Policy Manual contains a section regarding temporary employees which states:

Either full or part-time employees hired for a specific program or purpose whose positions may be eliminated when such programs terminate or when such services are no longer required. Such employees may perform one-time projects, assist with cyclical work, or work as needed during the absence of regular employees.

Temporary employees receive only State of California or federally required benefits.

The Employer's Administrative Services Manager Cheryl Joseph testified that when limited-term employees are hired, they are given a copy of the Employer's Notice of Personnel Action form showing that the type of appointment they are being given is a limited-term appointment and the expiration date for their appointment. The Employer's notice of personnel action forms include under types of appointment, regular; full-time; regular part-time; limited-term; extra; and % of time.

Joseph testified that a limited-term employee must go through a standard recruitment process if they wish to become a regular full-time or regular part-time employee. Joseph further testified that the limited-term employees must compete with candidates from inside and outside of the Employer for openings in regular permanent positions. There have been occasions where the employment of a limited-term employee is extended and based on the "need of the agency," which Joseph described as there being work that needed to be done. According to Joseph, limited-term employees may be extended in their employment based on a different funding source that that utilized for their initial hire. Joseph testified that when the term of employment of a limited-term employee is extended, they are still considered limited-term employees and they are given the term of their extension.

At the time of the hearing, the Employer employed three limited-term employees, Nel Sweet, Marcia Scarberry and Ben Sapp. All three are considered by the Employer to be full-time employees who work a maximum of 40 hours a week. All three work in the same position classification as permanent unit employees. However, they do not receive performance appraisals like the permanent employees. All three limited term employees share common supervision with permanent unit employees; are subject to the same work rules; work in the same locations; work similar hours; have regular contact; and are paid a wage which is comparable to the salaries of permanent unit employees in their positions. The limited-term employees do not receive medical benefits, paid holidays, accrued vacation or sick leave as do the regular employees. The State of California requires the Employer to pay for disability insurance for the limited-term employees.

With regard to Sweet, Scarberry and Sapp, the record contains a single Notice of Personnel Action form for each. The form for Sweet is dated November 29, 1999, and indicates that she is being appointed to the position of intake assistant as a limited-term employee and stating that "position is scheduled to complete on or before February 28, 1999 (sic)." (However, the Employer's Administrative Services Manager Cheryl Joseph testified that this date should read February 28, 2000). The form for Scarberry shows that she was appointed to the position of "SYETP payroll clerk," also called an "admin/program technician II," a limited-term position, on April 12, 1999. The form states, "appointed to a limited-term position with the summer program, scheduled to complete on or before September 30, 1999." The form for Sapp reflects that on April 12, 1999, he was appointed to a limited-term

position called facilities technician, also called an “admin/program technician I,” at a wage rate of \$9.94 an hour. The form states that this position is “scheduled to complete on or before October 31, 1999.” Joseph testified that the limited-term employment of Sapp and Scarberry will now expire on March 31, 2000. However, the record contains no documentation regarding this extension beyond the October 31 and April 12, 1999, termination dates shown on the face of the personnel action forms for these two employees. As indicated above, the termination date for Sweet is February 28, 2000.

As of the date of the hearing, Scarberry and Sapp had each received two consecutive limited-term appointments and Sweet had received three such positions. Sweet had been employed by the Employer on a continuous basis for about a year; and Scarberry and Sapp had been employed on a continuous basis for about 10 months.

At the time of the hearing, Sweet was working pursuant to her third limited-term position appointment. She was originally hired and worked from February 1999 to July 1999 as a summer intake person in the Employer’s summer youth program. In July 1999, she was rehired with no break in employment as an intake employee during the Employer’s recruitment process and she worked in this position until November 1999. Then, in November 1999, she was again rehired with no break in employment, as an intake assistant (also called an administrative tech II). Sweet’s current term expires on February 28, 2000.

As indicated above, Scarberry was initially appointed on April 12, 1999, to the limited-term position of SYETP payroll clerk (also called admin/program technician II, for a term to expire on September 30, 1999. She was then appointed to the position of fiscal assistant without any break in service for a term to expire on March 31, 2000. The record does not contain the personnel action form for her most recent appointment. Nor does it contain any specific evidence regarding the most recent interview process that led to her hire into her current position such as who interviewed her; who she competed against for the position; and whether anything was said to her about the likelihood of her term being extended again. As indicated above, Administrative Services Manager Cheryl Joseph testified generally that limited-term employees are told at the time of their hire that they are being hired into a limited-term position and the term of the position. However, the record does not disclose whether Joseph is actually the person who interviewed Sweet, Scarberry and Sapp when they were initially hired or when they were re-appointed to their subsequent limited term positions. None of the three employees testified at the hearing.

The record reflects that Sapp was initially appointed on April 12, 1999, to the limited-term position of facilities technician (also called admin/program technician I), for a term to expire on October 31, 1999. Then he was re-appointed to the same position

with no break in employment for a term that expires March 31, 2000. Again, the record does not contain the personnel action form for his last appointment and there is no evidence as to what he was actually told when he was re-appointed to the same position, including whether there was any likelihood his term would be extended again.

The record also includes an exhibit which lists the limited-term employees hired by the Employer during its 1998-99/1999-2000 program years; their hire dates; positions assigned; termination dates; and whether they transitioned into regular full-time positions. The list includes the names of 34 limited-term employees. Seven of these transitioned into regular full time positions with the Employer. They did so within periods that ranged from three to nine months. All of the other employees on the list were hired in 1998 or 1999. Three employees (Sweet, Sapp and Scarberry) are shown as still employed as limited-term employees. The list reflects termination dates for the other 24 employees. The length of employment for these 24 employees ranges from one month to one year. There is no indication on the list as to whether any of these 24 employees had more than one limited-term appointment as have the three employees at issue herein.

In addition to the seven employees on the above list who went from limited-term to regular permanent positions with the Employer, Joseph testified about several other limited-term employees who transitioned to permanent positions, including Richard Livingston, Iris Groom, Bill Leach, Donna French, Val Henderson and Connie Mack. Specifically, Livingston and Henderson both began working for the Employer in the position of summer youth counselor, a limited-term position. Livingston later moved to another limited-term position and is currently in a permanent position with the Employer as a case manager in the Employer's Welfare-to-Work program. Henderson also became a permanent employee with the Employer. Iris Groom, Bill Leach and Donna French were each hired as a limited-term employee at the Employer's Mare Island project (a \$10 million project to help with re-employment efforts of those laid off by the closure of the U.S. Navy base at Mare Island). Groom later moved into a permanent position as a case manager in the Employer's Title III (dislocated worker) program; Leach and French also became regular permanent employees. Connie Mack was initially hired as a youth participant in the Employer's program and then became a regular permanent employee.

Analysis. As indicated above, the Employer contends that Sweet, Scarberry and Sapp should be excluded from the unit on the basis that they are temporary employees. The Petitioner takes the opposite position.

As a general rule, employees are eligible to vote in a representation election if they are employed in the bargaining unit as of the eligibility payroll date. *Caribbean Communications Corp., d/b/a St. Thomas-St. John Cable TV*, 309 NLRB 106, 108

(1992); Pen Mar Packaging Corp., 261 NLRB 874 (1982); see also NLRB v. S.R.D.C., Inc., 45 F.3d 328 (9<sup>th</sup> Cir. 1995); St. Elizabeth Community Hospital v. NLRB, 708 F.2d 1436, 1444 (9<sup>th</sup> Cir. 1993).

However, the Board has formulated an exception to this general rule in the case of temporary employees. Under established Board policy, temporary employees are not eligible to vote and their eligibility status is determined as of the eligibility payroll date. The critical inquiry is whether the “temporary” employee’s tenure of employment remains uncertain as of this date. If it does, the employee is eligible to vote. Thus, in order to establish that an employee is a temporary employee and ineligible to vote in an election, the party alleging temporary status must “prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.” Caribbean Communications Corp., d/b/a St. Thomas-St. John Cable TV, *supra*, 309 NLRB at 108; Pen Mar Packaging Corporation, 261 NLRB 874 (1982); United States Aluminum Corp-Northeast, 305 NLRB 719 (1991); NLRB v. Kolka d/b/a Tables & Finnish-American Saunas, 170 F.3d 937, 940 (9<sup>th</sup> Cir. 1999); NLRB v. S.R.D.C., Inc., *supra*; NLRB v. New England Lithographic Co., 589 F.2d 29, 32 (1<sup>st</sup> Cir. 1978). The definiteness of the date for termination is generally fixed either by a calendar date or by reference to the completion of a specific task or project. Caribbean Communications Corp., 309 NLRB at 713 (termination tied to the completion of a special filing project); Emco Steel, Inc., 227 NLRB 989, 991 (1977) (temporary employees included those hired with “definite terminal dates,” “hired for a set term,” or hired “to perform a specific project or series of tasks”), *enf’d* without published opinion *sub nom*, Local 810, IBT v. NLRB, 562 F.2d 38 (2d Cir. 1977).

In the instant case, each of the three employees at issue shares a substantial community of interest with other unit employees given that they perform similar work to that performed by other unit employees; have common supervision; work at the same locations; have similar work hours; have contacts with each other; and earn comparable pay, albeit in the form of wages rather than salaries. As of the date of the hearing, it appeared they would be employed on the relevant payroll eligibility date. Thus, unless they are deemed ineligible to vote as temporary employees, they would be included in the unit and be allowed to vote in the election.

There is no dispute that Sweet, Scarberry and Sapp are all classified by the Employer as limited-term employees with specified dates for their terminations. However, the record also establishes that if the Employer believes that it needs a limited-term employee, it can and has re-employed such employees beyond their scheduled termination dates on numerous occasions either as regular permanent employees or as limited-term employees. Specifically, with regard to the three employees at issue herein, Sweet has been re-employed by the Employer three times, and Scarberry and Sapp have been re-employed twice.



There is no first-hand evidence regarding what actually happened when these three employees were hired initially or when they were rehired. Specifically, there is no evidence regarding what, if anything, they were told by the person or persons who spoke with them directly about their re-employment, concerning the likelihood of their being re-employed beyond their scheduled termination dates. Further, the record does not include the most recent personnel action forms for Scarberry and Sapp, as documentation of their March 31, 2000, termination dates.

Under all the circumstances presented, I find that the multiple terms of employment of the three employees at issue has created a reasonable uncertainty with regard to the terms of employment for Sweet, Scarberry and Sapp, despite the fact that on paper they may be in limited-term positions with set termination dates. Thus, by re-employing them on multiple occasions, the Employer has demonstrated that its limited term expiration dates are not “immutable,” and that they may be extended again and again. New World Communications of Kansas City d/b/a WDAF Fox 4, 328 NLRB No. 10 at slip op. at 1 (April 7, 1999). Given such evidence, and in the absence of any specific evidence that the Employer made it clear to these three employees that their most recent limited-term would be their last, I find that there exists a reasonable uncertainty as to their terms of employment. Thus, I find that Nel Sweet, Marcia Scarberry and Ben Sapp are eligible to vote in the election so long as they are employed on the payroll period eligibility date. Accordingly, Nel Sweet, Marcia Scarberry and Ben Sapp will be included in the bargaining unit.

460-5067-7000-0000